

Message Text

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ORIGIN OPIC-06

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DRAFTED BY OPIC/GC CHUNT
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-----015428 301010Z /21

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FM SECSTATE WASHDC
TO AMEMBASSY LISBON

UNCLAS STATE 178995

FROM OPIC

E.O. 11652: N/A

TAGS:EINV

SUBJECT:OPIC AGREEMENT

REF: (A) LISBON 4711 (B) STATE 304696

1. INTERPRETIVE NOTE PROPOSED BY FOREIGN MINISTRY IS BASED IN PART ON FEBURARY 2, 1977 AIDE MEMOIRE FURNISHED BY OPIC ACTING GENERAL COUNSEL CECIL HUNT TO RECORD UNDERSTANDINGS REACHED WITH MEMBERS OF COMMISSION TO ESTABLISH THE FOREIGN INVESTMENT INSTITUTE. (COPY LEFT WITH EMBASSY.) MAIN CONCERN OF GOP OFFICIALS WAS TO ASSURE THAT AGREEMENT TO SUBROGATION OF USG IN EVENT OF EXPROPRIATION CLAIM PAYMENT WOULD NOT IMPLY ACKNOWLEDGEMENT THAT GOP IS LIABLE TO PAY COMPENSATION IN THE AMOUNT OF SUBROGATION CLAIM.

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2. SUBSTANCE OF GOP INTERPRETIVE NOTE IS ACCEPTABLE EXCEPT FOR PROVISION THAT INSURANCE PROGRAM TAKE INTO CONSIDERATION THE CONCEPT OF EXPROPRIATION AS IT IS DEFINED IN PORTUGUESE LEGISLATION. AS TO FORM, WE BELIEVE IT IS SIMPLER AND PREFERABLE TO COVER THE INTERPRETIVE POINT IN A SINGLE NOTE EXCHANGE REESTABLISHING THE OPERATION OF THE PROGRAM. FURTHER, NOTE SHOULD REFER TO 1953 AGREEMENT

RATHER THAN 1948 ECONOMIC COOPERATION AGREEMENT, FOR REASONS NOTED STATE 304696 OF DECEMBER 16, 1976.

3. EMBASSY SHOULD PROPOSE THE FOLLOWING REVISED TEXT OF EMBASSY NOTE:

"EXCELLENCY,
I HAVE THE HONOR TO REFER TO THE AGREEMENT EFFECTED BY THE EXCHANGE OF NOTES ON MAY 22 AND 25, 1953, BETWEEN OUR TWO GOVERNMENTS ON THE SUBJECT OF UNITED STATES GOVERNMENT INVESTMENT INSURANCE AND GUARANTIES.

THE UNITED STATES GOVERNMENT IS PLEASED TO ADVISE THAT IF YOUR GOVERNMENT AGREES, THE UNITED STATES INVESTMENT INCENTIVE PROGRAMS WHICH ARE AUTHORIZED BY THE AFOREMENTIONED AGREEMENT AND WHICH ARE NOW ADMINISTERED BY THE OVERSEAS PRIVATE INVESTMENT CORPORATION CAN BE RESUMED IN CONNECTION WITH ACTIVITIES AUTHORIZED BY THE COMPETENT PORTUGUESE AUTHORITIES.

MY GOVERNMENT IS PLEASED TO ADVISE, FURTHER, THAT IT DOES NOT INTERPRET THE PROVISIONS OF THE AFOREMENTIONED AGREEMENT RELATING TO SUBROGATION OF THE UNITED STATES OF AMERICA TO IMPLY AN ADMISSION THAT THE GOVERNMENT OF PORTUGAL IS RESPONSIBLE IN THE AMOUNT PAID UNDER SUCH INSURANCE OR GUARANTIES. RATHER, IT IS THE UNDERSTANDING

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OF MY GOVERNMENT THAT THE AMOUNT OF LIABILITY OF THE GOVERNMENT OF PORTUGAL, IF ANY, WITH RESPECT TO ANY CLAIM TO WHICH THE GOVERNMENT OF THE UNITED STATES OF AMERICA MIGHT BE SUBROGATED PURSUANT TO SUBPARAGRAPH A. OF SAID AGREEMENT WOULD BE BASED ON THE LAWS OF PORTUGAL, ON APPLICABLE INTERNATIONAL LAW OR AGREEMENTS AND ON THE TERMS OF ANY ARRANGEMENTS OR AGREEMENTS ENTERED INTO BY THE GOVERNMENT OF PORTUGAL INVOLVING THE INVESTMENT TO WHICH THE CLAIM RELATES.

IF THIS PROPOSAL AND UNDERSTANDING IS ACCEPTABLE TO THE GOVERNMENT OF PORTUGAL, IT IS SUGGESTED THAT YOU REPLY BY NOTE.

ACCEPT, EXCELLENCY, ETC."

4. BASIC OBJECTION TO SECOND PARAGRAPH OF INTERPRETIVE NOTE PROPOSED BY GOP IS THAT IT DEPARTS FROM CONCEPT THAT THE INTERGOVERNMENTAL AGREEMENT IS LIMITED TO PROCEDURAL MATTERS AND THAT AGREEMENT DOES NOT CREATE OR DEFINE SUBSTANTIVE RESPONSIBILITIES TO INVESTORS OR BETWEEN GOVERNMENTS WITH RESPECT TO INVESTMENTS COVERED. WORDING

OF NOTE PROPOSED BY USG CITES THE SEVERAL POSSIBLE
SOURCES OF APPLICABLE LAW. GOP'S PROPOSED REFERENCE TO
PORTUGUESE LAW WOULD BE INCONSISTENT WITH THE STUDIED

NEUTRALITY OF THE OTHER TEXTS. AS A PRACTICAL MATTER,
OPIC CANNOT EXTEND ITS CONTRACT DEFINITION OF EXPROPRIA-
TORY ACTION BEYOND BROADLY RECOGNIZED NORMS WITHOUT
RISKING HAVING TO PAY CLAIMS ON WHICH IT CANNOT EXPECT
SUBROGATION RECOVERY. MOREOVER, STANDARD OPIC INSURANCE
CONTRACTS CONTAIN A WARRANTY BY INSURED THAT THE PROJECT
IS IN CONFORMITY WITH ALL LOCAL LAW THE INSURED CAN
REASONABLY BE AWARE OF. VANCE

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Sent Date: 30-Jul-1977 12:00:00 am
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Decaption Note:
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Disposition Approved on Date:
Disposition Case Number: n/a
Disposition Comment:
Disposition Date: 01-Jan-1960 12:00:00 am
Disposition Event:
Disposition History: n/a
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Drafter: GC CHUNT
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